

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ELOY ROMERO-DURAN,

Defendant.

Case No. 2:09-cr-00202-LDG

**ORDER**

The defendant, Eloy Romero-Duran, moves pursuant to 28 U.S.C. §2255 to vacate, set aside, or correct his sentence (#51).

As was stated by the Ninth Circuit in denying defendant's direct appeal, "[a] review of the record and the opening brief indicates that the questions raised . . . are so insubstantial as not to require further argument." The defendant's argument that his counsel at sentencing was ineffective for failing to argue that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), fails because the counsel does not render ineffective assistance by failing to raise a non-meritorious argument. *Shah v. United States*, 878 F.2d 1156, 1162 (9<sup>th</sup> Cir. 1989). On the defendant's direct appeal, the Ninth Circuit rejected the defendant's underlying argument that his sentence violated *Apprendi*.

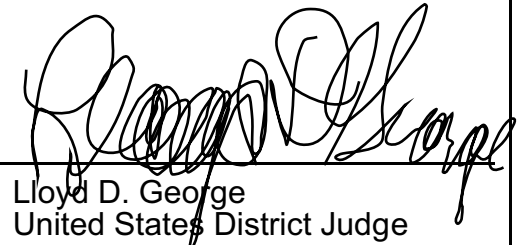
1 The defendant argues his counsel was ineffective for failing to argue his prior  
2 conviction was invalid under *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). The argument  
3 fails as a motion under §2255 does not provide a defendant with a mechanism to challenge  
4 a fully expired conviction that is used to enhance the challenged sentence. See *Daniels v.*  
5 *United States*, 532 U.S. 374, 381 (2001). As the Court must presume the validity of the  
6 prior conviction, the Court must also conclude that counsel was not ineffective for failing to  
7 argue the prior conviction was invalid.

8 Finally, the defendant's final argument--that he could not have violated 8 U.S.C.  
9 §1326 because he was neither prosecuted for re-entering the United States nor informed  
10 that his re-entry was a crime on his numerous prior deportations--is without any merit. It  
11 has been long settled that specific intent is not an element of §1326. *Pena-Cabanillas v.*  
12 *United States*, 394 F.2d 785, 790 (9<sup>th</sup> Cir. 1968).

13 Therefore, for good cause shown,

14 THE COURT **ORDERS** that Defendant's Motion under 28 U.S.C. §2255 to Vacate,  
15 Set Aside or Correct Sentence (#51) is DENIED.

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17 DATED this 21 day of March, 2014.

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20 Lloyd D. George  
21 United States District Judge  
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